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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL D. DIEDERICH, JR.,

Petitioner,

—v.—

THE COUNTY OF ROCKLAND, C. SCOTT VANDERHOEF, COUNTY EXECUTIVE and PAUL NOWICKI, COUNTY ATTORNEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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4/3??

QUESTIONS PRESENTED

As to a municipal civil servant, a staff attorney who, along with three other Democratic part-time attorneys, was terminated from his public employment shortly after a Republican county executive took office, where none of many full-time Democratic attorneys were fired, and where the municipality acknowledged that political affiliation was irrelevant to job performance:

1. Are principles of federalism violated when a federal court ignores a state's merit-based civil service system by denying First Amendment protection to a civil servant?

2. Should the federal courts nationwide be permitted to create a categorical rule that attorneys are not entitled to First Amendment protection in their public employment, even when political affiliation is admittedly irrelevant to effective job performance?

3. Can the federal courts countenance a municipality's intentional deception of its citizens regarding the operation of government—"informational gerrymandering"—without violating the Guarantee Clause's promise of a republican form of government?

4. May a federal court dismiss a *prima facie* §1983 case of First Amendment retribution, including the taking of vested time accruals, without any inquiry into the facts at hand?

PARTIES TO THE PROCEEDING

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case, except that the county attorney is now Patricia Zugibe.

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Petitioner, Michael D. Diederich, Jr., respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The Court of Appeals' opinion is not published, but can be found at *Diederich v. County of Rockland*, 1998 U.S. App. LEXIS 31460 (2d Cir. 1998), annexed at Appendix A. The district court's opinion is reported at *Diederich v. County of Rockland*, 999 F. Supp. 568 (S.D.N.Y. 1998), annexed at Appendix B). The district court's civil judgment is at Appendix C.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on December 15, 1998. Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the date of entry. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution reads, in part, as follows:

> "Congress shall make no law ... abridging the freedom of speech, ... and to petition the Government for a redress of grievances."

Article IV, section 4 of the United States Constitution reads, in part, as follows:

> "The United States shall guarantee to every State in this Union a Republican Form of Government ...."

Article 5, section 6 of the New York State Constitution provides:

> "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive;...."

Section 42 of the New York State civil service law provides, in part:

> "1. The non-competitive class shall include all positions that are not in the exempt class or the labor class and for which it is found by the commission having jurisdiction to be not practicable to ascertain the merit and fitness of applicants by competitive examination. Appointments to positions in the non-competitive class shall be made after such non-competitive examination ...."

Section 107 of the New York State civil service law, the "Little Hatch Act," provides, in part:

> "1. ... No recommendation or question under the authority of this chapter [the N.Y.S. civil service law] shall relate to the political opinions or affiliation of any person whatever; and no appointment or selection to or removal from an office or employment within the scope of this chapter or the rules established thereunder, shall be in any manner and affected or influenced by such opinions or affiliation.
>
> 2. ... No person shall directly or indirectly ask, indicate or transmit orally or in writing the political affiliation of any employee in the civil service of the state or of any civil division thereof ..., as a test of fitness for holding office."

STATEMENT OF THE CASE

This First Amendment case can resolve a profound dilemma faced by thousands, if not tens of thousands, of governmental attorneys throughout the country, namely, whether their loyalty should be to merit service and professionalism (especially when in a merit-based civil service system), whether it should be to political bosses and partisan interests. How the First Amendment question is resolved will determine whether America's participatory democracy will include educated public servants, or exclude them.

This case raises questions of nationwide importance. The Second Circuit's "shared ideology" doctrine is being used to justify patronage the blanket discharge of attorneys and other public employees, which *per se* approach is employed in other circuits. The

"shared ideology" doctrine abridges not only public employees' right of political association, but also of free speech. And if employees cannot speak or affiliate, they cannot participate in democracy. This Court's intervention is needed, not only for the sake of individual liberty, but for our democracy.

1. *Patronage Discharge of Public Attorneys*

The material facts in this case are undisputed. Petitioner's employment, and that of other Democratic attorneys, was terminated after the election of a Republican county executive in 1993. Petitioner's colleagues promptly filed suit, resulting in a jury verdict in their favor, which jury specifically found that political affiliation was unnecessary for effective job performance and thus did not justify the patronage discharges. The verdict was reversed by the Second Circuit Court of Appeals in *Gordon v. Rockland County*, 110 F.3d 886 (2d Cir., 1997*), cert. denied*, 118 S. Ct. 74 , 139 L. Ed. 2d 34 (1997).

Petitioner's amended complaint was filed after, and in response to, the *Gordon* decision. Respondents then moved under Rule 12(b)(6) to dismiss the amended complaint, which motion was granted. *App.* 3a. Dismissal was affirmed by the Court of Appeals below. *App.* 1a.

2. *Petitioner, a Protected Civil Servant whose Discharge Was Unrelated to Effective Job Performance*

The decisions below were made notwithstanding unrefuted allegations supporting petitioner's First Amendment claims. Petitioner received a civil service appointment, as a part-time attorney for respondents' department of solid waste management and law department, after (non-competitive) civil service examination.[1] His job description was identical to his more senior co-workers: full-time assistant county attorneys, also Democrats, but whom remained employed.

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[1] Petitioner's civil service appointment was based upon merit under § 42 of the New York State civil service law, and was thus distinct from appointment to the civil service law § 41 "exempt" category (which included positions such as the county attorney, deputy county attorney and confidential secretary). Petitioner's full-time colleagues, with identical job description, enjoyed full tenure as § 44 "competitive" employees. *See*, N.Y.S. Civil Service Law §§ 41, 42 & 44.

Respondents offered no evidence that political affiliation was needed for the effective performance of petitioner's staff attorney job. On the contrary, respondents' statements, corroborated by its conduct, are that political affiliation was irrelevant to the attorney job. All evidence in this case reveals this non-partisan role.

a. *Petitioner was Not a Patronage Appointee*

Petitioner's public service career is representative of many attorneys in public service, beginning in 1984 with a three year military tour as a Judge Advocate Corps (JAG) officer serving with the United States Army in Europe. Thereafter, petitioner was hired as an assistant county attorney for Westchester County, where he worked in a Republican Administration, practiced environmental law, earned a Masters of Law degree in environmental law, and represented Westchester County in submitting a petition to this Court.[2] Many municipal law departments protect their attorneys from political discharge, either through civil service (as here) or collective bargaining.

Thus, petitioner's background was not that of a political appointee, but rather was one of a professional governmental attorney especially qualified in environmental law. This is consistent with petitioner's appointment in a merit-based civil service title.

It is unrefuted that petitioner was hired on merit as an environmental attorney for the respondent Rockland County, based upon his professional background and experience. As a part-time attorney, petitioner played an active environmental role for Rockland County, submitting a brief to this Court in the solid waste flow control case, *C &A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), and authoring a law review article on the subject.[3]

b. *Staff Attorneys in a Merit-Based Municipal Law Department*

The County's expressed view is that its Law Department is professional and non-partisan, which view did not change after the November 1993 election. Both the former county attorney, Ilan

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[2] The Petition for Certiorari was denied in *N.Y.C. Public Utility Services Agency et al v. FERC*, 502 U.S. 810 (1991).

[3] Diederich, *Does Garbage Have Standing?--Democracy, Flow Control and Solid Waste Management*, 11 PACE ENVT'L L. REV. 157 (Fall 1993).

Schoenberger, and his successor, respondent Paul Nowicki, publicly expressed the view that partisanship had no place in the office.

Mr. Nowicki's public stance regarding his termination of petitioner's Democratic colleagues was not based upon political affiliation:

> Question: Can you explain why you wanted new attorneys?
> Answer: Because I wanted to.
> Question: Did you have any specific reasons other than that they were new to the office?
> Answer: Different, yeah. No.
> Question: No reason?
> Answer: That was the reason.
> Question: That they were new and different?
> Answer: Right.
> Question: There was no other criteria applied?
> Answer: No.

See, Gordon v. Rockland County Trial transcript at p. 312-13.

Political affiliation, according to Mr. Nowicki, had no bearing in firing the Democrats. For example, Nowicki was acquainted with petitioner's replacement, yet did not know his political affiliation:

> Question: Is he a Republican?
> Answer: If I have to bet, I bet he was, but I wouldn't bet a lot."

Id., at 315.

This was also the publicly expressed view of the newly elected county executive, respondent C. Scott Vanderhoef, who claimed that his personnel actions were solely based upon merit. As quoted in a local weekly newspaper, respondent Mr. Vanderhoef asserted:

> "If anybody thinks that people 'trade favors' to get jobs in Rockland County, they don't understand how we handle appointments in this administration. Politics doesn't matter in these appointments—the only thing that matters is merit. We want to make sure that the best person is selected to take care of the taxpayers' needs."

See, THE INDEPENDENT, May 21, 1997, at 5 (emphasis added)

c. *The Attorney Position, and Lawyer Professional Ethics, Required Non-Partisanship*

Merit appointment was consistent with the non-partisan duties of respondents' staff attorneys. The county attorney is appointed with the consent of the county's legislature (which remained Democratic). The Legislature is the policy-making body for the county, and an important duty of the new Republican county attorney and his staff is to give counsel and representation to the Democratic Legislature.

The nonpartisan role of respondents' staff attorneys is also shown by the status of each of the full-time assistant county attorneys, all of whom enjoy fully-protected "competitive" civil service status (as determined by the local civil service commission). Full-time and part-time assistant county attorneys have identical job descriptions, with the only difference between them being that the full-time attorneys had more extensive duties and responsibilities and competitive civil service status, and the part-time attorneys had lesser responsibilities and non-competitive civil service status.[4]

After Mr. Vanderhoef's election, the only attorneys who were replaced were the county attorney, and the part-time attorneys. The deputy county attorney (Ms. Zugibe), and the full-time assistant county attorneys, all Democrats, remained employed.[5]

3. *Patronage Appointees Turn into Protected Civil Servants*

After the new patronage-appointed assistant county attorneys were installed, the Respondents began efforts to transform these jobs into the protected service civil service "competitive" class, for their new hirees. At the same time, respondents were arguing to the Second Circuit in *Gordon* that "shared ideology" is necessary for these "assistant county attorney" positions. Respondents have never explained how the same job description requires shared ideology one moment, and then does not after new attorneys are appointed.

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[4] Of course, the county attorney and deputy county attorney had the greatest responsibility, and were both in the civil service § 41 "exempt" category.

[5] As indicated in the Parties to the Proceeding above, Mr. Vanderhoef's new county attorney is Patricia Zugibe, who has remained employed in the Law Department, originally hired as an assistant county attorney under the prior Democratic administration. This appointment of a Democrat by a Republican is consistent with Mr. Vanderhoef's articulated "merit-appointment " philosophy."

4. *Political Retaliation regarding Earned Time Accruals and Other Earnings*

Petitioner's amended complaint alleges a 42 U.S.C. § 1983 violation based upon the county respondents' refusal to pay petitioner approximately $8,000 in earned time accruals solely because of petitioner's political affiliation, which vested entitlements vanished from petitioner's last wage and earnings statement. Petitioner similarly alleges that the respondents delayed payment for other contractual earnings, until immediately after decision in the *Gordon* case, and that this delay was similarly due to petitioner's political affiliation. Without any discovery on this issue, the courts below found no § 1983 violation, but rather characterized the constitutional deprivations as a mere contractual issue.

5. *Respondents' Sanctions Motion against Petitioner for Pursuit of First Amendment Claims*

In response to petitioner pursuing his First Amendment claims in the District Court, respondents moved for Rule 11 sanctions, based upon the *Gordon* decision, notwithstanding that the *Gordon* plaintiffs were then seeking certiorari by this Court, notwithstanding that the *Gordon* court was under the incorrect impression that the plaintiff attorneys were exempt employees, and notwithstanding the civil service status job metamorphosis for the patronage hirees.

6. *Second Circuit Summary Affirmance*

In its summary opinion, the Second Circuit acknowledged petitioner's non-exempt civil service status, but held that this was not determinative and merely one factor to consider. However, with virtually no evidence submitted by respondents on its motion to dismiss, the court of appeals based its decision not on the uncontested evidence and averments of this case, but rather on the *Gordon* case, where petitioner was not a party.

REASONS FOR GRANTING THE WRIT

Certiorari is necessary here for compelling reasons: First, the court of appeals decision below directly conflicts with this Court's public employment patronage discharge and free speech decisions, and with fundamental principles of federalism. The Second Circuit sanctioned the partisan discharge of a civil servant, notwithstanding that:

- state civil service law afforded petitioner First Amendment protection;
- the county declined to assert, or to demonstrate, that political affiliation was needed for effective job performance, but instead always viewed political affiliation as irrelevant to attorney job performance;

The court of appeals uses a "shared ideology" approach to patronage discharge cases, dispensing with this Court's teachings that political discharge requires that political affiliation be necessary for effective job performance. Today, lawyers in public service are categorically denied First Amendment rights as citizens. This new doctrine approach not only abridges public servants' right of association, but also eliminates their right of <u>any</u> speech , or even silence, since any expression or non-expression negates "shared ideology." Court of appeals holdings in this and similar cases reflect a monumental departure from this Court's teachings regarding basic constitutional law which must be corrected.[6] Sup.Ct. Rule 10(c).

The Second Circuit's rulings in particular imperil the livelihoods, and will divide the loyalties, of governmental lawyers and other professionals throughout the nation, by making them vulnerable to partisan politics irrespective of their civil service status, and irrespective of the relevance of political affiliation to their public employment. The rulings will subject public employees to termination for even trivial expression of a "non-shared ideology." Employee duty to professionalism, legal ethics, public service and their local community finds no judicial sanctuary. Career longevity in the public sector will once again be governed by Tammany Hall. Qualified lawyers will decline public service. Others will become

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[6] *See, e.g., Branti v. Finkle*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

political sycophants. Without judicial protection, public attorneys' speech will be frozen, and cronyism will reign supreme.

A second reasons for certiorari is that the court of appeal's holdings are in conflict with those of other circuits, most seriously by holding that governmental attorneys (except public defenders) are *per se* unprotected against political patronage by the First Amendment, and that such claims from governmental staff attorneys cannot reach a jury because of the "inherent" policymaking nature of an attorney's job description. This profoundly conflicts with the Eleventh Circuit, which has stated that assistant United States attorneys are protected against patronage dismissal, (and thus assistant county attorneys as well.) *See*, *Cutcliffe v. Cochran*, 117 F.3d 1353, 1358, n.4 (11th Cir. 1997). The Second Circuit views conflict with the Fifth, Seventh and Eighth Circuit views that a jury of citizens, not unelected judges, are best suited to determine difficult factual and policy questions, such as those presented here. *See*, *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288-89 (7th Cir. 1985). . And the Second Circuit's views conflicts with the Eleventh Circuit, which rejects the notion that a "paper" job description reciting "policymaking" duties is dispositive of the First Amendment issue. *See, Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996). This Court must resolve these case-determinative conflicts, particularly the right to a jury where local governance is at stake. Sup.Ct. Rule 10(a).

Thirdly, the court below determined that there was no constitutional foul, and no 42 U.S.C. § 1983 claim, where a county government retaliates against a citizen by denying over $8,000 in earned time accruals and by delaying contractual payments due to petitioner's political affiliation. In its supervisory role, the Court should review the summary rejection, without any discovery, of this civil rights claim. Sup.Ct. Rule 10(a).

Fourthly, by ignoring a central feature of state governance, New York's constitutionally-mandated system of meritocracy in public employment, and by allowing local democracy to be impaired through "informational gerrymandering," the lower courts have disregarded the Guarantee Clause's promise of a republican form of government. *See*, Art. IV, § 4. Democracy requires honesty from governmental leaders, not deception of the electorate about the partisan firing of protected civil servants. These are novel and profoundly important issues. Sup.Ct. Rule 10(c).

In sum, this case offers an extraordinary opportunity for the

Court to review this legal terrain, to create desirable bright lines[7] clarifying the constitutional rights of civil servants, and to clarify when patronage dismissal is permissible. This case presents novel questions of federalism, public employees' First Amendment rights, and participatory democracy, all of vital importance to the American public.

POINT I

The Second Circuit disregard for a state's system of self-governance—here New York 's civil service meritocracy—imperils federalism as well

In ruling on petitioner's claims, the Second Circuit totally ignores the very body of law—state civil service law—which provides the foundation for deciding a First Amendment patronage discharge cases. This Court's prior patronage cases all involved civil service exempt employees. *See, e.g., Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347, 357 (1976).[8] Petitioner was a non-exempt classified civil servant.

The lower courts' summary rejection of the New York's civil service law, which state law is merit-based and prohibits political influence, disregards basic principles of federalism and cannot be left standing.[9] New York State's constitution and civil service law are all absolutely clear. They mandate meritocracy in the civil service, free of political influence. *See, e.g., Ottinger v. State Civil Service Commission*, 240 N.Y. 435, 148 N.E. 627 (1925)(Cardozo, J.) (Attorney General staff not *per se* exempt); New York State Constitution, art. 5, § 6. As a public employee in the civil service law § 42 "non-competitive" class, petitioner had First Amendment rights.

The Second Circuit fails to respect this governing state law. As stated in *Voorhis v. Warwick Valley Central School District*, 92 A.D.2d 571, 572; 459 N.Y.S.2d 325, 327 (2d Dept. 1983):

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[7] *See*, Porto, *The Consititution and Political Patronage*, 13 PACE L. REV. 87 (Winter 1993)

[8] *See also*, Note, *Politics and the Non-Civil Service Public Employee: a Categorical Approach to First Amendment Protection.* 85 COLUM. L. REV. 558 (1985).

[9] The Guarantee Clause is closely related. *See*, Point VI *infra*.

> "...permanent public employees in the noncompetitive class, such as petitioner, are protected from bad-faith discharge in contravention of the fundamental purposes of the civil service system (e.g., discharge for patronage purposes....)" (emphasis added)

This view of New York State's civil service law was recently confirmed by federal district court Chief Judge Charles Brieant:

> "Positions in the competitive class are filled from among the top three names on a list certified by the Commission after conducting a competitive examination. Positions in the non-competitive class may be filled upon showing that the appointee has the qualifications necessary to perform the job. As to exempt positions, anything goes."

See, Largo v. Vacco, 977 F.Supp. 268, 273, n.3 (S.D.N.Y. 1997).[10]

The lower court's generalized view of First Amendment exemptions here is not a minor intrusion, but affects the machinery of government in New York State—its civil servants. For the courts below to ignore New York's constitutional and legislative choice on a matter of self-governance, by overriding its civil service law, strikes a blow to federalism.

The Second Circuit had it correct in an earlier case when it said:

> "Both the interests of federalism and the conservation of judicial resources would ordinarily be better served by the federal courts' giving substantial deference to the state's judgment where government positions are so defined."

See, Savage v. Gorski, 850 F.2d 64, 69 (2d Cir. 1988)(involving civil service law § 41 "exempt" positions). Ignoring the state civil service law "allows the federal judiciary to intrude undesirably into the very structure of the state and local governments. *Id.*

This Court must not allow the Second Circuit to adopt a neo-

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[10] Respondents may cite a 1935 New York case, decided by a 4-3 vote, for the proposition that Civil Service Law § 107 does not protect non-competitive class civil servants. *See, Merriweather v. Roberts*, 268 N.Y. 12 (1935). However, as both Chief Judge Brieant and the *Voorhis* court undoubtedly recognized, *Merriweather* (involving politically motivated discharge of this low-level, non-confidential, non-policymaking employee--an assistant bathhouse keeper) is certainly not good law today, in light of this Court's dictates in *Elrod* and *Branti*.

Lockner[11] approach, ignoring state law protective of employees (e.g., New York's civil service law) so that it can also ignore First Amendment protection.[12] The courts of appeal must be reminded that unbridled patronage is not sanctioned by this Court even as to exempt employees, let alone the protected civil servant involved here.

The court of appeal's antimajoritarian disregard for New York merit system of public employment, and the protection it affords to non-exempt civil servants, is contrary to fundamental principles of federalism. Certiorari is required to preserve the proper federal-state relationship.

POINT II

It is an affront to this Court's teachings in *Branti, Elrod, Connick & Pickering* to permit a political patronage of a staff attorney, where the municipality admits that political affiliation is irrelevant to job performance

The facts of this case indicate that political affiliation had absolutely no bearing on job performance of petitioner or his part-time Democratic colleagues. Respondents have not even pretended that political affiliation was or is necessary for attorney job performance. Yet, the Second Circuit's view is that public attorneys are *per se* exempt from First Amendment protection against patronage discharge (and thus exempt from free speech protection as well) because of a purported governmental privilege of hiring or retaining attorneys based upon "shared ideology." This is a dangerous judicial approach, which abridges participatory democracy.

A. *Political Affiliation was Indisputably Irrelevant to Attorney Job Performance*

In this case, the court of appeals has authorized politically partisan "open season" on unaffiliated or politically mis-affiliated

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[11] *Lochner v. New York*, 198 U.S. 45 (1905).

[12] *See*, GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1995), at p.118-123 (Judge Learned Hand's own life experience regarding Tammany Hall, and his non-appointment to the Supreme Court, offers its own lessons on why political affiliation should not be a job requirements for a lawyer, or a judge).

governmental attorneys.[13] Fair game includes, as in the present case, low level staff attorneys (even where higher level attorneys are given protection and retained); attorneys who are protected by a state civil service system; attorneys who are competent, strictly professional and totally apolitical in their professional work; and attorneys whose only misfortune is occupying a job viewed by a party boss as ripe for an award of patronage. Such a blanket denial of constitutional protection disregards this Court's teachings.

In the Second Circuit, personal affiliation (e.g., favoring friends) is now sufficient to replace a governmental civil servant, and override First Amendment rights. Under *Elrod* and its progeny, this Court permitted termination based only upon political affiliation, and only after heightened scrutiny. The Second Circuit's approach is an invitation to cronyism, with governmental purpose replaced by private interest.[14]

The First Amendment right to speech and political association are the most vital of Bill of Rights protections--central to both personal freedom and democracy. The First Amendment provides the right to say and think what one believes, and to be heard, especially on matters of public concern and governance. And it is the right to be a Democrat, or a Republican. "The First Amendment protects political association as well as political expression." *Elrod, supra,* 427 U.S., at 357 , quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). The Court has made clear that public sector employment cannot ordinarily be conditioned on political affiliation, *Elrod, supra,* political speech, *Board of County Commissioners v. Umbehr*, 116 S.Ct. 2342 (1996), or political support, *O'Hare Truck Service v. City of Northlake*, 116 S.Ct. 2353 (1996).

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[13] The Third Circuit is in agreement with the Second Circuit that governmental attorneys are *per se* exempt policymakers. *See, Ness v. Marshall*, 660 F.2d 517, 521 (3d Cir. 1981)(city solicitors). The Eleventh Circuit has stated that it will provide government attorneys with protection. *See, Cutcliffe v. Cochran*, 117 F.3d 1353 (11th Cir. 1997) (expressing 11th Circuit's view that *Branti* would not permit the political patronage discharge of assistant United States attorneys).

[14] Cronyism not only includes hiring unqualified political hangers-on. It also includes the hiring of "friends" (personal, business) or the children of judges or other important officials in order to win friendship. Public attorney jobs are particularly ripe for such non-political, non-ideological (and constitutionally unjustified) patronage.

The teachings of this Court make clear that public employees retain their First Amendment rights, and are protected from "political firings," except under limited circumstances. A politically based firing must support a "vital and paramount" interest, and be necessary for governmental purposes. *Elrod, supra,* 427 U.S., at 362. Much more is required than the "merely showing of legitimate state interest." *Id.* Rather, "exacting scrutiny" is required. *Id.* Doubtful situations must be resolved in favor of the petitioner. *Id.*, 427 U.S., at 368. Moreover, this Court has made it unequivocally clear that in political firing situations, the burden is on respondents to establish that, in balancing the respective interests of the parties, the petitioner's fundamental First Amendment rights should yield to the greater public interest. It is the government's burden to "demonstrate an overriding interest in order to validate an encroachment on protected interests." *Elrod*, 427 U.S., at 368. (emphasis added) As stated in *Branti v. Finkel*, 445 U.S. 507, 518 (1980):

> "the ultimate inquiry is ... whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." (emphasis added).

As conceded by respondents in *Gordon*, petitioner was unquestionably fired on political grounds—for respondent officials to dole out patronage—and this was the basis for decision both in *Gordon* and the present case. Yet respondents agree with petitioner that political affiliation was irrelevant to petitioner's municipal job. They deny that politics played a role in the firings, and they claim that appointments are based upon merit and professional competence. As stated by County Executive Vanderhoef: "Politics doesn't matter in these appointments—the only thing that matters is merit." *See, supra.* Respondents admit that they did not know the party affiliation of the attorneys they fired, or the replacement attorneys they hired.

This view is consistent with the conversion of a part-time assistant county attorney job into a full-time job, with the full-time job having complete civil service protection. Petitioner should have received protection as well, against politically-influenced discharge. It was unadulterated hypocrisy for respondents to argue to the Second Circuit in *Gordon* that political affiliation and "shared ideology" was necessary for the office of "assistant county attorney," while contemporaneously bestowing protection upon the patronage hirees.

The Second Circuit ignores the fact that respondents have not,

and cannot, constitutionally justify their patronage discharge of petitioner. If, as respondents exclaim, politics was irrelevant to the personnel action, then there was no constitutional justification for firing all the Democratic part-time attorneys. The lower courts holdings in this and similar cases cannot be left standing, where the infringement upon First Amendment rights is so palpable.

The Second Circuit forgets what other circuits recognize as fundamental, that "[p]olitical association is at the core of the First Amendment, and even practices that only potentially threaten political association are highly suspect." *McCloud v. Testa*, 97 F.3d 1536, 1552 (6th Cir. 1996). Here, the Second Circuit penalizes association, by sanctioning dismissal of "affiliated" Democrats even where the government employer itself declares that political affiliation is irrelevant to its personnel actions.

B. *"Shared Ideology" Means Chilled Speech*

The Second Circuit's novel "shared ideology" approach also eviscerated public attorneys' right of free speech and thought, by making individual opinion (or silence) a basis for continued public employment. Under its new analysis, formerly protected public employees whose speech (public or private) might reflect, even to a trivial degree, thought or ideology different from that of the municipal employer, or whose silence might fail to reflect shared ideology, can now be fired, and "friends" hired.

Now, if an assistant district attorney is outspoken on a matter of manifest public concern, she nevertheless will have no First Amendment protection, as her public speech will show lack of "shared ideology" with her public employer. *Cf., Connick v. Myers*, 461 U.S. 138 (1983). In the Second Circuit, public employment can now be conditioned upon protected speech and associations. This is constitutionally abhorrent. It chills public discourse and abridges the liberty and associations of citizen-professionals who may choose public service. *See, Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

The need for certiorari is compelling. This case is of exceptional national importance, because public employees' freedoms of speech and political association, vital to participatory democracy, are being rejected to allow mere cronyism. The rights of public servants, especially professionals hired on the basis of merit, should not be infringed to favor naked patronage without proper governmental

purpose or constitutional justification.

POINT III

This Court must resolve the split among the circuits on case-determinative issues, including whether government lawyer's job description creates *per se* exclusion from First Amendment protection, and if not, whether a jury should decide whether effective job performance requires political affiliation

The Second Circuit's First Amendment views are contrary to those of other circuits on essential issues. It views public attorneys (except assistant public defenders) as categorically unprotected against patronage discharge. *See*, *Bavaro v. Pataki*, 130 F.3d 46 (2d Cir. 1997), *cert denied*, 118 S.Ct. 1801, 140 L.Ed 2d 941 (1998); *Vona v. County of Niagara*, 119 F.3d 201 (2d Cir. 1997); *Gordon*, 110 F.3d 886 (2d Cir. 1997). Paper job descriptions are viewed as dispositive, regardless of case specific circumstances. Thus, these cases never reach a jury, even though it is the jury—local electors—who have the most direct interest in the functioning of their government's civil servants.

Job Description is But One Factor

The crux of the Second Circuit's methodology is that an "attorney" job description creates, *ipso facto*, a First Amendment-exempt policymaking job. As stated by the court of appeals in *Danahy v. Buscaglia*, 134 F.3d 1185 (2d Cir. 1997), "*Gordon* explained that such inquiry presents a question of law informed solely by the job description and the powers of office." 134 F.3d, at 1191, *citing Gordon*, *supra*,110 F.3d, at 888-89)(emphasis added). Under the Second Circuit's approach, First Amendment exemption involves looking only at job description, not actual duties.

Other circuits, on the other hand, have correctly held that the Supreme Court's teachings require an individualized analysis of all relevant factors, including an analysis of duties actually performed, in deciding whether a patronage firing is permissible. This analysis is not limited to mere job description. After all, any shrewd drafter can add "policymaking" language into even a janitor's job description.

Accordingly, the Third Circuit finds it necessary is to "examine the functions performed by the individual occupying the relevant position," because, as stated in *Elrod*, "[t]he nature of the

responsibilities is critical. *Peters v. Delaware River Port Authority*, 16 F.3d 1346, 1353 (3d Cir. 1994); *Waskovick v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993)(emphasis added).

Similarly, the Eleventh Circuit, in *Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996), pointedly rejected the Second Circuit's narrow approach. It interpreted *Branti* to require study of "[t]he inherent powers and actual job responsibilities of the position involved, and the relationship of the particular position to the elected official, should be part of the analysis." *Id.*(emphasis added).

It is the Third and Eleventh Circuit cases, not the Second Circuit's, which properly frame *Branti*'s inquiry whether political "party affiliation is an appropriate requirement for effective performance of the public office." 445 U.S. at 518. The Third and Eleventh Circuits examine the totality of job functions, including actual and potential duties, because "effective performance of the public office" requires the public employee to satisfactorily discharge all relevant duties, actual or inherent. The Second Circuit's instruction that courts should only consider potential duties is much too narrow—it means that a janitor's or groundskeeper's potential policymaking becomes dispositive. This Court must resolve the conflict between the circuits.

Focusing on job description alone, the Second Circuit has developed an impenetrable barrier to public attorneys' vindication of constitutional rights. Though simplistic, using job description creates unprincipled decisions, as demonstrated in the present case and *Gordon*, where only the most junior, least "policymaking", attorneys were fired, notwithstanding their civil service status, and where all senior staff attorneys remained.

Let the Jury Decide

The Second Circuit, contrary to other circuits, withholds for itself the right to rule on the constitutional exemption as a matter of law, preventing its presentation as an issue of fact reserved for a jury. In so doing, it is improperly hoarding factual decisionmaking on issues which directly affect governance.

Other circuits respect the right to trial by jury regarding the "policymaking" issue in these First Amendment cases. They disagree with the Second Circuit, and view the *Branti* test as one of fact, not law. As stated by the Seventh Circuit in *Soderbeck, supra*, 752 F.2d 285, 289:

> "Rightly or wrongly, our system commits the decision of complex as well as simple facts, facts tinctured with legal or policy significance ... to the jury in cases in which a right to a jury trial is given."

See also, Nebolny v. Painter, 653 F.2d 1164, 1169-70 (7th Cir., 1981)("it was for the trier of fact to determine whether [plaintiff] was a policymaker.")

The Second Circuit has ruled against the First Amendment claim of each public attorney to come before it, without sanctioning a jury trial in any of these litigations.[15] *See*, *Bavaro v. Pataki*, 130 F.3d 46 (2d Cir. 1997); *Vona v. County of Niagara*, 119 F.3d 201 (2d Cir. 1997); *Gordon*, 110 F.3d 886 (2d Cir. 1997). The *Gordon* case reached a jury , and the jury rendered a verdict in favor of the public attorneys, specifically finding under the *Branti* formulation that political affiliation was not an appropriate requirement for effective job performance.[16] Nevertheless, the Second Circuit reversed, retrieving for itself the determination of facts, jealously keeping for itself the factfinding role which our legal system intends for the jury.

And where, as in the present case, absolutely no evidence was presented opposing petitioners averments or proof,[17] the Second Circuit nevertheless upheld the district court's dismissal as a matter of law, denying a jury before the case even reached discovery.

Categorical Rule of Exclusion

The Second Circuit has developed a categorical rule of exclusion regarding public attorneys. Its *per se* rule denying public attorneys First Amendment protection conflicts with that of the Eleventh Circuit, which holds the view that even assistant United States

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[15] See, e.g., Susan Lourde Martin, *A Decade of Branti Decisions*, 39 Am. U. L. Rev. 11, 28 (1989) ("The Second Circuit is openly hostile to expanding the categories of public employees to which *Elrod*/*Branti* protection applies....").

[16] See, *Gordon* petition for certiorari, at App.19.

[17] In fact, petitioner believed himself entitled to summary judgment, and so moved, as respondents did not contradict that petitioner was a low level attorney, without public contact, non-policymaking and non-confidential (as corroborated by a N.Y.S. Public Employee Relations Board determination), non-partisan, and supervised by a department head who was retained, as were all of full-time attorneys except the county attorney.

attorneys are protected against patronage discharge (and undoubtedly encompass assistant county attorneys). *See, Cutcliffe v. Cochran*, 117 F.3d 1353 (11th Cir. 1997). *Cutliffe*, contrary to the Second Circuit's views, upholds the teachings of *Elrod* and *Branti* that even as to attorneys, each case must be decided on its own merits.

As set forth in Point II, *supra,* the Second Circuit's categorical exclusion extends to all public employees who require subjective "shared ideology." If an employee speaks on a matter of public concern, such will reveal a disqualifying lack of "shared ideology," thereby permitting discharge. This constitutionally chilling view conflicts with the Ninth Circuit's protection of the speech of an assistant prosecutor in *Finkelstein v. Bergna*, 881 F.2d 702 (9th Cir. 1989), *opinion withdrawn on other grounds*, 924 F.2d 1449, 1453 (9th Cir. 1991) and of a government lawyer in *Johnston v. Koppes*, 850 F.2d 594 (9th Cir. 1988), both consistent with the teachings of this Court in *Connick*.

In sum, the Second Circuit's hostile approach toward public attorneys' First Amendment rights conflicts with the views of other circuits in important, case-determinative ways. Because this is an area of law vital to both individual civil rights and to democratic governance, certiorari is a necessity.

POINT IV

Governmental retaliation for a citizen's exercise of First Amendment rights, by taking property, is abhorrent to the Constitution and actionable under § 1983

This Court should review the lower courts' rejection, out of hand and without discovery, of petitioner's *prima facie* 42 U.S.C. § 1983 claim of political retribution. Although the amount of money involved is small (approximately $8,000), the precedent of rejecting claims of First Amendment retaliation is dangerous for the civil rights of all.

Petitioner alleges that respondents eliminated earned wage and time accruals because of petitioner's political affiliation. Later, regarding a subsequent independent contract, respondents delayed other contractual payments due petitioner, because of his political affiliation (conveniently paying immediately after the *Gordon* trial was concluded without plaintiff's testimony). These acts are constitutionally impermissible punishment for petitioner's exercise of First Amendment rights, actionable under 42 U.S.C. § 1983. Yet, the

lower courts determined that this retaliation was merely a contractual matter.

The governmental retaliation continued even after petitioner served his amended complaint. Respondents moved for Rule 11 sanctions, based upon petitioner's commencing a lawsuit challenging his patronage dismissal, even where certiorari was being sought in the *Gordon* case, and where the facts as found by the Gordon case were both inaccurate and incomplete. In light of the district court's comments, the chill to first amendment rights, and the right of citizens to petition their government through the courts, is palpable.

Dismissal, without even discovery, was improper. The Supreme Court has made clear that contractual interests cannot be impaired based on a person's speech, *Umbehr*, *supra*, or political affiliation or support, *O'Hare Truck Service*, *supra*. The instant case stands no differently. This Court must intervene in its supervisory role, lest the courts below run roughshod over all "disfavored" parties, such as the *pro se* attorney here.

POINT V

The Second Circuit's view of public attorneys ignores lawyers' ethical obligations

Judges are often appointed based upon political affiliation, but politics should play no part in their judging. The same concept applies to public lawyers. The ABA Code of Professional Responsibility, adopted by the New York State Bar Association, sets forth proper lawyer ethical conduct. *See*, New York Judiciary Law, Appendix. Lawyers should "maintain the integrity of the legal profession," "exercise independent professional judgment," "represent a client completely ... [and] zealously within the bounds of the law" and should "avoid even the appearance of professional impropriety."

All these ethical mandates counsel that political affiliation must have no bearing on representing a municipal client. However, the Second Circuit presumes the opposite. Its view, based upon ordinary "attorney" job descriptions, is that a professional governmental lawyer will ineffectively carry out duties assigned based upon his or her political bias. This is an unsupported notion which runs against

professional ethics, lawyer advocacy,[18] and common sense. Inadequate performance should result in discharge, political beliefs should not. This Court has rejected a presumption of disloyalty as to subordinate employees, and no different rule should apply to attorneys. As this Court stated in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74 (1990):

> "[a] government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views."

Here, no changes were politically necessary for the higher-ranking officials (the solid waste department head, or all senior staff attorneys), and no justification offered for the removal of their subordinate, the petitioner. To permit dismissal by assuming political affiliation infects attorney performance suggests that professional ethics are meaningless.

Respondents should have considered that "a lawyer who is a public officer … should not engage in activities in which his personal or professional interests are or for suitably may be in conflict with his official duties." See, Ethical Consideration 8-8. Thus, activities which would likely result in political largess, including granting naked patronage to politically supportive attorneys, must be viewed as unethical and improper. After all, how does the new attorney pay the "debt" owed for the political favor?

Petitioner, on the other hand, has pursued his case mindful of Canon 8, which states, in part, that:

> "[O]ur legal system should function in a manner that commands public respect. By reason of education and experience, lawyers are especially qualified to initiate corrective measures therein."

If a lawyer believes that the existence of a rule of law,

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[18] Court have not suggested that lawyers need be criminal to represent criminals, female to represent women, or minority to represent minorities. Democratic attorneys represent a republican, and vice versa, in every court in the nation, each day. Why should public employment be different?

substantive or procedural, causes or contributes to an unjust result (as when attorneys are fired solely because of their political affiliation, and the public misled about this) he should endeavor by lawful means to obtain appropriate changes in the law. *See*, Ethical Consideration 8-2.

As with judges, inadequate performance by lawyers should result in discharge. However, political belief or affiliations in itself must not, at least absent demonstration of a compelling governmental interest.

POINT VI

The Constitution's article IV, § 4 guarantee of a "republican form of government" is impaired, and participatory democracy undermined, when the federal courts allow a municipality to intentionally deceive the public regarding local governance

The Guarantee Clause assures to the citizens of the several states a "republican form of government." *See*, Art. IV, § 4. While most commonly this issue involves a non-justiciable political question, sometimes, as here, it does not.

First, the Court should grant certiorari to review the court of appeal's violation of the Guarantee Clause, by its refusal to respect New York's constitutional and statutory mandate that civil servants be hired, and fired, only based upon merit. As set forth at Point I, *supra*, where the people of a State, through their elected officials, decide that non-exempt civil servants shall not be adversely affected by political influences, the federal courts should be loath to nullify such democratic choice.

Second, democracy cannot operate from an uninformed, or wrongly informed, electorate. "Informational gerrymandering" is no less invidious than racial gerrymandering—both dilute the power of voters. This Court has affirmed the notion that governmental misrepresentation of the electorate may violate the Guarantee Clause. *See, e.g., Burger v. Judge*, 364 F.Supp. 504 (D. Montana 1973), *affirmed*, 414 U.S. 1058 (1973). Misleading voters on a ballot may deprive the electors of their right to vote, and thus create a justiciable Guarantee Clause controversy. *See*, *Kohler v. Tugwell*, 292 F.Supp. 978 (E.D.La. 1968), *affirmed*, 393 U.S. 531 (1969); see also, *Reynolds v. Sims*, 377 U.S. 533, 582 (1964). Misleading voters

regarding civil service personnel decisions is not a trivial matter. Rather, it involves what is most important to government—who does the people's work.

In this case, the federal courts' action in dismantling New York's merit system of civil service, and condoning municipal misrepresentations regarding civil service employees, has subverted participatory democracy. The federal courts have permitted deception of the local electorate, and in so doing have damaged the citizenry's right to a republican form of government. Without truth, democracy cannot survive.

The Guaranty Clause issue is novel, important, and warrants a grant of certiorari.

POINT VII

Bright lines can be drawn, which will inform the courts, local government, public servants and the public when patronage firings are permissible

No better case exists than the present one, and none better will likely arise soon, to define the important First Amendment and federalism issues at issue here, and to create "bright lines" assisting local governments and the courts in defining the respective rights of civil servants, local government, local politicians, the legal profession, and most importantly, the public. Bright lines are needed,[19] and instructive lines can be drawn here.[20]

First, the Court can draw the bright line by affirming that non-exempt civil servants are entitled to the federal First Amendment protection promised by the state civil service system. State civil service laws can, and should, be used to properly define when partisanship is needed in public employment.

Next, the Court can reaffirm that hiring government has the burden of demonstrating—for the public employee, for the electorate,

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[19] Comment, *Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U.CHI. L.REV. 897 (1992).

[20] *Cf. Rutan, supra*, 497 U.S. 62, 113 (Scalia, J. dissent)(regarding patronage issue, "there is no right line... or at least [none] that can be nationally applied and that is known by judges.").

and if litigation ensues, for the courts—a justifiable basis for political discharge under the teachings of *Elrod, Branti* and *Rutan*. The Third Circuit, in *Waskovick v. Morgano*, 2 F.3d 1292,1297 (3d Cir. 1993), has offered a sound guideline for analyzing patronage discharge case: whether a difference in political affiliation is "highly likely to make the employee ineffective." Such a test is consistent with the need for heightened scrutiny and a "compelling" showing to override First Amendment rights. *Cf.*, *Peters*, *supra*, 16 F.3d, at 1361 (dissent). Even a less rigorous test will provide the courts of appeal with necessary direction.

Finally, the Court's intervention is necessary to protect public employees' federal right to a trial by jury, especially where reasonable minds might differ. A jury of citizens, not an unelected judiciary, is most appropriate for deciding whether the public's civil servants should be governed by partisan politics and cronyism, or by professionalism and merit.

Conclusion

Certiorari is needed, on behalf of all lawyers in public service, because of the profound danger to America's participatory democracy if public servants are not assured of First Amendment freedoms of political affiliation and free speech. Local officials must not be allowed to misrepresent the public on matters essential to their informed self-governance. The federal courts must not disregard core principles of federalism, by ignoring state civil service law and the First Amendment protections it affords. Without the Court's review, democracy itself is harmed.

Accordingly, the grant of a writ of certiorari is respectfully requested.

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